

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIE GURSKEY)	
Claimant)	
VS.)	
)	Docket No. 206,293
MEADOWBROOK TERRACE)	
Respondent)	
AND)	
)	
ZURICH-AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from an August 21, 1996 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge denied claimant's request for preliminary benefits, finding the condition complained of by claimant not to have arisen out of and in the course of her employment with respondent. That is the sole issue for Appeals Board review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board has jurisdiction to review a finding regarding a disputed issue of whether the employee suffered an accidental injury which arose out of and in the course of the employee's employment. See K.S.A. 44-534a, as amended.

Claimant initially injured her left knee at work on June 18, 1995. Respondent does not dispute the compensability of that injury. Claimant injured her left knee a second time on September 15, 1995 when she again slipped and fell in water on the floor at work.

On September 17, 1995 claimant had reported for work and was preparing to clock in when, as she described it, "I rounded the nurses' desk and I couldn't walk anymore. My knee just popped and I couldn't take any more steps. I just hurt." Prelim. Hr'g. at 11. Claimant also described the incident in this way, "I couldn't walk on it. It just locked up on me and I couldn't walk." Prelim. Hr'g. at 9.

Respondent denied compensability of the September 17, 1995 incident, calling it a personal risk that was due solely to a preexisting arthritic or degenerative condition. The Administrative Law Judge apparently agreed but also noted that claimant had not clocked in and was not in the service of her employer when the accident occurred.

Claimant's counsel, in his brief to the Appeals Board, argued that claimant was on her way to retrieve supplies for the evening meal at the time of her September 17, 1995 injury. Accordingly, claimant was performing her job duties as a cook at respondent's nursing home when her knee gave way under the stress and strain of her usual labor. Therefore, claimant argues, the injury arose out of and in the course of her employment. The claimant's testimony was that she has been instructed to retrieve a tub of cottage cheese and was on her way to clock in before doing so. Claimant's counsel submits that if claimant had not gone to clock in before retrieving the cottage cheese her knee would not have been injured on the job. It is argued that since claimant's supervisor was aware that she was experiencing knee pain, the supervisor should have instructed claimant to sit down until her knee pain subsided, or in the alternative, recommended that claimant not continue to work. It follows, therefore, as claimant's argument goes, that because claimant's job activity necessarily involved walking, her participation in such activity, especially when experiencing knee discomfort, exposed claimant to an increased risk of injury beyond that which would be incidental to claimant's normal day-to-day living activities. The task of walking then becomes a special hazard created by the employer. Fortunately for claimant, the Appeals Board need not decide whether or not walking constituted a special hazard in order to decide this appeal.

Claimant testified that she had not experienced any problems with her left knee prior to her June 18, 1995 slip-and-fall injury at work. Following that injury, claimant was off work for two weeks before being returned to light duty. Thereafter, claimant's knee

continued to hurt and would give out without warning. Following the September 17, 1995 incident claimant sought medical treatment and was eventually referred to Dr. V.C. Patel, an orthopedic surgeon in Independence, Kansas. Dr. Patel's office notes are included with various other medical records as Claimant's Exhibit 1 to the preliminary hearing transcript. His entry for November 7, 1995 includes the following statement; "She has been having pain in the left knee. The original injury goes back to June when she twisted her knee. It was sore. It popped in September while working and it locked on her." This entry in the medical records, together with the testimony of claimant that her left knee never stopped being symptomatic following her June 18, 1995 injury, convinces the Appeals Board that the most recent incident which occurred while simply walking on September 17, 1995 was a direct, natural and probable consequence of the original June 18, 1995 injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes dated August 21, 1996 should be, and is hereby, reversed and remanded to the Administrative Law Judge for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

c: Robert W. Lattin, Independence, KS
Gregory S. Brown, Kansas City, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director